



## BEFORE THE ARIZONA CORPORATION COMMISSION

AZ CORP COMMISSION

DOCKET CONTROL

COMMISSIONERS

SUSAN BITTER SMITH, Chairman  
BOB STUMP  
BOB BURNS  
DOUG LITTLE  
TOM FORESE

2015 JUL 24 PM 2 56

In the matter of:

CONCORDIA FINANCING  
COMPANY, LTD, a/k/a  
"CONCORDIA FINANCE,"

ER FINANCIAL & ADVISORY  
SERVICES, L.L.C.,

LANCE MICHAEL BERSCH, and

DAVID JOHN WANZEK and LINDA  
WANZEK, husband and wife,

Respondents.

DOCKET NO. S-20906A-14-0063

**SECURITIES DIVISION'S:**

**(1) RESPONSE/NON-OPPOSITION  
TO THE ER RESPONDENTS'  
MOTION TO ALLOW  
TELEPHONIC TESTIMONY OF  
WITNESSES, and**

**(2) REPLY IN SUPPORT OF  
MOTION FOR LEAVE TO  
PRESENT TELEPHONIC  
TESTIMONY**

**RESPONSE/NON-OPPOSITION TO THE ER RESPONDENTS' MOTION  
TO ALLOW TELEPHONIC TESTIMONY OF WITNESSES**

The Securities Division's ("Division") does not oppose the ER Respondents'<sup>1</sup> Motion To Allow Telephonic Testimony (filed 07/20/2015). In not opposing the ER Respondents' request for telephonic testimony, the Division reserves its right to object to their testimony on all other appropriate grounds.

Arizona Corporation Commission

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<sup>1</sup> The "ER Respondents" are Lance Michael Bersch, David Wanzek, Linda Wanzek and ER Financial & Advisory Services, L.L.C.

**REPLY IN SUPPORT OF MOTION FOR LEAVE TO PRESENT  
TELEPHONIC TESTIMONY**

This Tribunal should grant the Division's Motion for Leave to Present Telephonic Testimony ("Motion"). Concordia Financing Company, Ltd. ("Concordia") does not oppose the Division's Motion,<sup>2</sup> and except with respect to one witness, the ER Respondents do not oppose it either. The ER Respondents plan to have up to sixty-five (65) of their witnesses testify telephonically.<sup>3</sup>

The Division's witness whom the ER Respondents object to testifying by telephone is A. Craig Mason, Jr. of Kansas City, Missouri. Mr. Mason is the Senior Vice President of Kansas City Life Insurance Company and General Counsel for its subsidiary, Sunset Financial Services. Mr. Mason is expected to testify that contrary to what Messrs. Bersch and Wanzek misrepresented in their marketing materials, neither Kansas City Life nor Sunset Financial ever "approved" investments in Concordia. This is the evidence the ER Respondents seek to prevent by opposing Mr. Mason's proposed telephonic testimony.

The Division's Motion established good cause to permit Mr. Mason to testify by telephone, and the ER Respondents' Response does nothing to challenge that good cause.<sup>4</sup> Specifically, the ER Respondents do not contest that the cost of bringing Mr. Mason from Kansas City to Phoenix to testify for what will likely be less than fifteen (15) minutes of direct testimony would be prohibitively expensive for the Division. Although the ER Respondents suggest that Mr. Mason's employer would pay the cost of his trip "as part of the cost of doing business," Response at

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<sup>2</sup> See Concordia Finance's Response filed 07/21/2015 to the Division's Motion.

<sup>3</sup> See ER Respondents' Motion to Allow Telephonic Testimony of Witnesses.

<sup>4</sup> See *In re HM-2008-000867*, 225 Ariz. 178, 181, ¶ 11, 236 P.3d 405, 408 (2010) ("When considering telephonic testimony, the initial inquiry should be whether good cause has been shown for its use.").

1 2:5-6, his employer is under no obligation to do so. Moreover, because Mr. Mason  
2 resides beyond Arizona's jurisdiction, the Commission cannot subpoena him to  
3 attend. *Cf.* R14-3-309(O) (Commission may issue subpoenas "requiring the  
4 attendance of a witness from any place in the state of Arizona...."). Consequently,  
5 unless Mr. Mason is permitted to testify telephonically, the Division will have to pay  
6 for his travel to and from Kansas City and his accommodations in Phoenix, assuming  
7 he would even agree to be inconvenienced by such a trip.

8 The ER Respondents have previously acknowledged that "[t]he Commission  
9 has limited resources,"<sup>5</sup> which is certainly true. Those limited resources should not  
10 be unnecessarily spent bringing a witness, albeit an important one, to Phoenix for  
11 what will likely be less than fifteen (15) minutes of direct testimony. *See Mathews v.*  
12 *Eldridge*, 424 U.S. 319, 348 (1976) (recognizing "the Government's interest, and  
13 hence that of the public, in conserving scarce fiscal and administrative  
14 resources...."). Good cause exists to permit Mr. Mason to testify by telephone.

15 The Division's Motion established that permitting Mr. Mason to testify  
16 telephonically would comport with procedural due process. *See* Motion at 4:19  
17 through 6:22.. The ER Respondents do not contend otherwise. In fact, they concede  
18 this point by not even addressing it. *See In re 1996 Nissan Sentra*, 201 Ariz. 114, ¶  
19 7, 32 P.3d 39, 42 (App. 2001) (failure to address issues raised in opening brief can be  
20 considered a concession of those issues).

21 The only argument the ER Respondents make is that the allegation that neither  
22 Kansas City Life nor Sunset Financial ever approved the investments they sold "is  
23 not as simple as the Division indicates." Response at 2:2-3. The ER Respondents do  
24 not provide any factual basis for this cryptic statement. It cannot overcome the good  
25 cause the Division has established for allowing Mr. Mason to testify by telephone.

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<sup>5</sup> Motion to Dismiss and Answer filed 04/04/2014 at 8:17-18.

1 Nor does the fact that the ER Respondents purportedly “anticipate substantial  
2 cross-examination for [Mr. Mason]”<sup>6</sup> warrant imposing the expense and  
3 inconvenience of the Division bringing Mr. Mason to Phoenix, if he is even willing  
4 to come. If Mr. Mason testifies by telephone, the ER Respondents will still be  
5 entitled to fully cross-examine him. *In re HM*, 225 Ariz. at 182, ¶ 13, 236 P.3d at  
6 409 (“Although Dr. F. was not physically present in the courtroom, he was subject to  
7 full cross-examination.”). Telephonic testimony “preserves paralinguistic features  
8 such as pitch, intonation, and pauses that may assist an ALJ in making  
9 determinations of credibility.” *T.W.M. Custom Framing v. Indus. Comm’n of Ariz.*,  
10 198 Ariz. 41, 48, ¶ 22, 6 P.3d 745, 752 (App. 2000). Accordingly, telephonic  
11 testimony “does not significantly increase the risks of an erroneous deprivation.” *In*  
12 *re HM*, 225 Ariz. at 182, 236 P.3d at 409.

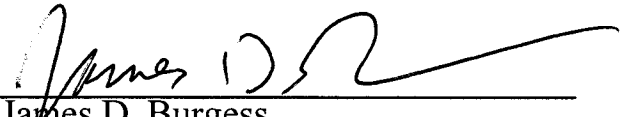
### 13 CONCLUSION

14 Permitting Mr. Mason to testify telephonically will allow the Division to  
15 present relevant witness evidence that is expected to be reliable and probative, is  
16 fundamentally fair, and does not compromise the ER Respondents’ due process  
17 rights. Therefore, the Division respectfully requests that its Motion be granted.

18 RESPECTFULLY SUBMITTED 24<sup>th</sup> day of July, 2015.

19 ARIZONA CORPORATION  
20 COMMISSION

21 By

  
22 James D. Burgess  
23 Attorney for the Securities Division  
24 Arizona Corporation Commission  
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<sup>6</sup> Response at 2:3-4.

1 ORIGINAL and 8 copies of the foregoing  
2 Motion to Allow Telephonic Testimony  
3 filed this 24<sup>th</sup> day of July, 2015, with:

4 Docket Control  
5 Arizona Corporation Commission  
6 1200 W. Washington St.  
7 Phoenix, AZ 85007

8 COPY of the foregoing hand-delivered  
9 this 24<sup>th</sup> day of July, 2015, to:

10 The Honorable Mark H. Preny  
11 Administrative Law Judge  
12 Arizona Corporation Commission  
13 1200 W. Washington St.  
14 Phoenix, AZ 85007

15 COPIES of the foregoing mailed and emailed  
16 this 24<sup>th</sup> day of July, 2015, to

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